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In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF RESPONDENT RHODE ISLAND LIQUOR STORES ASSOCIATION

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STATEMENT OF THE CASE

Claiming that splits exist both between the circuits and among various states, petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. (Liquormart, Peoples, petitioners) have asked that this Court review and "correct" a decision of the United States Court of Appeals for the First Circuit reversing a decision of the United States District Court for the District of Rhode Island. Relying primarily on the four-prong balancing test set forth in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), petitioners assert that two Rhode Island statutes violate their First Amendment right to free commercial speech. Respondent Rhode Island Liquor Stores Association (RILSA), on the other hand, contends that the court of appeals correctly held that there was no violation of petitioners' constitutional guarantees particularly when the Twenty-first Amendment to the United States Constitution is added to the balance.

After a hearing on December 17, 1991, the Rhode Island Liquor Control Administrator found that Liquormart had violated the provisions of R.I. Gen. Laws § 3-8-7. Appendix (A.)[1] 48. She imposed a $400 fine which Liquormart paid; Liquormart did not take an administrative appeal. A. 20-21.

Peoples owns several liquor stores in Massachusetts. It was interested in advertising liquor prices in Rhode Island media outlets to attract Rhode Island purchasers to

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[1] All citations to the appendix refer to the appendix to the petition for a writ of certiorari.

its Massachusetts stores but was prevented from doing so by the provisions of R.I. Gen. Laws § 3-8-8.1. A. 49.

On February 28, 1992, Liquormart and Peoples filed this action against the State. RILSA's motion to intervene as a defendant was granted. The trial was conducted on March 11, 1993. The parties stipulated to a number of facts, including that "the state of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages." A. 22. The record of the trial consists of the transcript of the deposition testimony of one expert and the presentations of the parties, augmented by the depositions of two additional experts. *Id.*

In his Memorandum and Order, first noting the "pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising," A. 22, the judge reviewed the testimony presented. He observed that the experts presented by the plaintiffs "maintained * * * that there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." A. 23.

The judge required the State to bear the burden of justifying the alcohol-price advertising ban. He rejected the argument that the Twenty-first Amendment adds a presumption of validity to the state statutes and, thus, shifts the burden of proof to the party challenging its constitutionality. A. 42-43. The court held: "I find as a fact that Rhode Island's off-premises liquor price-advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." A. 31. Based on that factual

conclusion, the judge found that the statutes are unconstitutional because they impermissibly restrict commercial speech. A. 47.

RILSA and the State of Rhode Island each appealed that decision to the court of appeals. The appeal was argued on February 10, 1994. On May 2, 1994, the court issued the first of its three opinions. The trial court's decision was reversed in part and sustained in part: the statutes were held to be constitutional insofar as Rhode Island merchants are affected but unconstitutional as applied to Massachusetts merchants. In reaching its decision the court applied the *Central Hudson* test:

> At the outset, we must determine whether the expression is protected by the First Amendment. [I] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [II] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [III] whether the regulation directly advances the governmental interest asserted, and [IV] whether it is not more extensive than is necessary to serve that interest.

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5, 6 (1st Cir. 1994), *quoting Central Hudson*, 447 U.S. at 566, A. 4.

All parties petitioned for a rehearing and suggested a rehearing *en banc*. Those petitions were denied on July 8, 1994. On that same date, the court's May 2 judgment was vacated, the opinion withdrawn, and a second opinion

was substituted.[2] The result reached in the second opinion was the same as that of the first decision although the reasoning regarding Massachusetts merchants differed. The court specifically provided that the parties could file petitions for rehearings with suggestions for rehearing *en banc* by July 22, 1994. All parties took advantage of that opportunity.

Liquormart and Peoples' petition was denied on July 29, 1994. On October 24, the petitions filed by RILSA and the state were granted, the July 8 opinion was withdrawn, and the judgment of that date was vacated. In its place a third opinion was issued and judgment was entered for RILSA and the state. On reconsideration, the court found that petitioners had waived the issue of the relationship between the Commerce Clause and the Twenty-first Amendment by failing to brief it on appeal. A. 11-12. Thus, the court held that, without the Commerce Clause, Peoples could not prevail on its claim. Therefore, the District Court's decision was reversed.

SUMMARY OF ARGUMENT

Respondent Rhode Island Liquor Stores Association respectfully urges that the petition for a writ of *certiorari* be denied. There are four discrete issues raised by the petition, which taken either individually or all together, are insufficiently compelling for this Court's attention.

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[2] This second opinion was designated "not for publication."

First, contrary to petitioners' spirited attempt to demonstrate otherwise, there is no significant split of authority between the United States courts of appeal. Also there is no reviewable split amongst the states. Finally, there is no split between the courts of appeal and the decisions of the highest state courts.

Second, petitioners' contention that the court of appeals incorrectly applied the last two prongs of the *Central Hudson* test is flawed. There are two lines of commercial-speech cases issuing from this Court. Petitioners depend entirely on the cases regarding the advertising of professional services. They disregard the more applicable cases regarding the advertising of "vices." Alcohol has been lumped by this Court with cigarettes, prostitution, and gambling – all vices. Thus, the cases upholding restrictions on advertising of gambling are highly relevant to the issue of alcohol advertising.

Third, the litany of cases in which this Court has found that the Twenty-first Amendment does not prevail over other constitutional clauses is not persuasive on the issue of the interaction between the Twenty-first Amendment and the First Amendment. That is particularly true given the limits to First Amendment protection of commercial speech.

Fourth, Petitioners waived the Commerce Clause issue in the court of appeals. The ban on liquor-price advertising within Rhode Island is binding on out-of-state entities advertising in Rhode Island. In applying its laws equally to in-state retailers and to out-of-state retailers, Rhode Island has not engaged in economic protectionism in violation of the Commerce Clause.

REASONS FOR DENYING THE WRIT

I. There is no split of authorities between the circuits or between the states to warrant the issuance of a writ of *certiorari*.

Petitioners maintain that there is a conflict between decisions issued by the Court of Appeals for the First Circuit in this case, that of the Fifth Circuit in *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984), and that of the Tenth Circuit in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Furthermore, they believe that there is a split between decisions of courts from individual states. These perceived conflicts are more apparent than real.

A. There is no meaningful split of authority between the Circuit Courts of Appeal.

In *Dunagin*, the Court of Appeals for the Fifth Circuit was faced with a split of opinion between two district court decisions regarding the constitutionality of Mississippi's restrictions on liquor advertising. Consequently the court comprehensively reviewed the full range of commercial-speech First Amendment protections and exceptions. After first exploring the scope of the protection, the court considered the effect of the Twenty-first Amendment. Particularly, the decisions in *California v. LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), were examined for this Court's perception of the effect of the Twenty-first

Amendment on protected speech. In *dicta* the court mused:

> *LaRue* and *Bellanca* are cases where fully protected speech was constitutionally restricted because the restriction was incidental to the rational regulation of liquor. It may follow that because any restriction on the advertisement of liquor itself is necessarily related, rationally and directly, to liquor regulation, restrictions placed upon that advertisement by the states are consistent with the First Amendment.

718 F.2d at 745.

The court ultimately based its decision on its application of the *Central Hudson* test to the facts before it. 718 F.2d at 736. Thus, it held that liquor advertising should be treated as protected commercial speech to satisfy the first prong. It found that Mississippi had a substantial interest satisfying the second prong. 718 F.2d at 747. As to the third, it held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban." At that point, the court noted that "the added presumption of validity required by *LaRue*, *Bellanca* and *Queensgate* [*Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982)] helps to establish the balance in favor of the state, if balancing be necessary." 718 F.2d at 750. As to the fourth prong, the court again paid lip service to *LaRue*, *Bellanca*, and *Queensgate* but quoted and relied on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality decision), which has no Twenty-first Amendment component. Thus, the alcohol-advertising limitation was found to be

no broader than necessary to meet the state's interest in protecting the health, safety and welfare of its citizens. *Dunagin*, 718 F.2d at 751. Although the *Dunagin* Court considered the effect of the Twenty-first Amendment on alcohol advertising, it ultimately based its decision firmly on the *Central Hudson* analysis. Therefore, the Twenty-first Amendment evaluation is totally tangential to the holding of the case. That being so, the special concurrence, questioning the effect of the amendment, does not have the impact assigned to it by the petitioners.

Even accepting petitioners' contention that the concurring judges in *Dunagin*, added to the dissenting judges, rejected the influence of the Twenty-first Amendment on alcohol-advertising provisions, later opinions of this Court have addressed their concerns. The concurrence opined:

> A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution places liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations.

718 F.2d at 754. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), and *United States v. Edge Broadcasting Company*, ___ U.S. ___, 113 S.Ct. 2696 (1993), have each upheld restrictions on advertising of another vice: gambling. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments."

Edge, 113 S.Ct. at 2707. Legislative judgments made pursuant to the Twenty-first Amendment are entitled to room as are those regarding other vices. In the commercial-speech arena, liquor does not hold a unique position after *Posadas de Puerto Rico* and *Edge*. The judges concurring in *Dunagin* in 1983 have been subsequently undercut by those decisions.

Oklahoma Telecasters is in agreement with *Dunagin*. There the court believed that this Court's dismissal of the appeal in *Queensgate* for want of a substantial federal question was dispositive of the alcohol-advertising issue. *Oklahoma Telecasters*, 699 F.2d at 497. Acknowledging that an independent examination of the merits of the case was nevertheless appropriate, the court applied the *Central Hudson* standard. The court recognized that "Oklahoma's alcoholic beverage advertising prohibitions are an exercise of authority within that granted by the Twenty-first Amendment." 699 F.2d at 498. However, "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." *Id.* As did the *Dunagin* Court, the *Oklahoma Telecasters* Court relied on *Metromedia* as a guide to its *Central Hudson* analysis. Inasmuch as all four criteria were found to have been met, the alcohol-advertising provisions were held to be constitutional. The effect of the Twenty-first Amendment was to add another element to the *Central Hudson* balancing test causing a shift in the state's favor. 699 F.2d at 502.

The First Circuit decision in *44 Liquormart* is in substantial agreement with *Oklahoma Telecasters*. Here the court of appeals also undertook a *Central Hudson* review of the facts before it. That review is surveyed in Section II

below. The court found that the statutes met the *Central Hudson* standard. *44 Liquormart*, 39 F.3d at 7-8, A. 7-8. "In addition, the presumption based upon the Twenty-first Amendment, *LaRue, supra,* seems precisely in order." 39 F.3d at 8, A. 8.

The three courts of appeals which have explored the relationship of the Twenty-first Amendment to the First Amendment are in general agreement. Each has considered the precedential value of the denial of the *Queensgate* appeal. Each has considered the effect of this Court's decision in *LaRue*. Each has acknowledged that the Twenty-first Amendment has a bearing on the issue. Each has done an independent *Central Hudson* analysis of the facts before it. Finally, each has upheld the constitutionality of the alcohol-advertising provisions enacted by the states. There is no meaningful split of authority between the Circuit Courts of Appeal and, therefore, the petition should be denied.

B. There is no split of authority between the states sufficient to invoke this Court's jurisdiction.

Rule 10.1(b) of the Supreme Court Rules provides that review on writ of *certiorari* may be granted "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." In arguing that the state courts are divided petitioners rely on the decision in *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 370 N.W.2d 328 (Mich. Ct. App. 1985). That is the only state court decision cited which has failed to uphold alcohol-price advertising restrictions.

The problem here is evident: the Michigan Court of Appeals is not a state court of last resort. The Michigan Supreme Court has not addressed the issue. The other state decisions to which petitioners advert have upheld their statutes: *Queensgate; Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc.*, 650 A.2d 854 (Pa. 1994);[3] *Rhode Island Liquor Store Association v. Evening Call Publishing Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (1985).

Rule 10.1(a) of the Supreme Court Rules is of no more usefulness to petitioners than is Rule 10.1(b). Rule 10.1(a) provides that jurisdiction will lie "[w]hen a United States court of appeals * * * has decided a federal question in a way in conflict with a state court of last resort * * * ." In this instance the Courts of Appeals for the First, Fifth and Tenth Circuits as well as the highest courts of the states of Ohio, Pennsylvania and Rhode Island are in agreement: statutes restricting alcohol advertisements enacted under the authority of the Twenty-first Amendment are constitutionally valid. There is no split among the various jurisdictions of sufficient importance to warrant this Court's review.

II. The court of appeals correctly held that the district court misapplied the *Central Hudson* test.

In upholding the validity of the Rhode Island statutes pertaining to alcohol-price advertising, the court panel

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[3] A petition for *certiorari* has been filed in this Court, No. 94-1247, in *Hospitality Investments*. *See* Brief of Amicus Curiæ, Association of National Advertisers, Inc., filed in support of the petition in the instant case.

applied the *Central Hudson* test to the facts before it. Finding no need to consider the first two prongs, since there was no question presented by the first and the state's interest was stipulated, the court focused on the third and fourth issues. Petitioners assert that the court incorrectly resolved those questions. However, when the issues are viewed in the light of a spectrum of this Court's commercial-speech decisions, the court of appeals' opinion is clearly correct.

A. The statutes under review directly advance the state's interest in promoting temperance.

The court of appeals, first noting that the burden of proof is on the party seeking suppression, determined that the district court had applied too strict a test. In deciding whether a statute directly advances the state's interest, "[i]t is not correctness, it is reasonableness." *44 Liquormart*, 39 F.3d at 7, A. 5. The court looked to a wider range of this Court's cases than do petitioners. Thus, it recognized that the *Central Hudson* phrase "directly advances" is not absolute. *Id.*

In support of that recognition, the court cited *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792 (1993), which addressed the question whether a certified public accountant has a protected First Amendment right to solicit business personally. Florida law prevented that practice. This Court observed:

> [L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

113 S.Ct. at 1798. Applying "this intermediate standard of review," the Court found that the regulation of Certified Public Accountants by the State of Florida was unduly burdensome on First Amendment rights. Basically, in *Edenfield* the fit between the stated interests and the regulation was found to be missing even under a "reasonable manner" standard.

Petitioners rely on both *Edenfield* and *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S.Ct. 2084 (1994), a similar case concerning the advertising of professional qualifications by a lawyer who was also a CPA. They insist that the Florida cases define the standard for measuring "directly advance" in this case. What they fail to take into account is that there is a difference in the standard when this Court speaks of advertising of professional services and when it considers advertising of "vices." At least two lines of cases have emerged in commercial-speech cases: one concerned with an individual's right to market his or her profession and the other addressing the state's right to protect the health, safety and welfare of its citizens from various vices. *Edge* characterized vice activities as those that "[can] be, and frequently [have] been, banned altogether." 113 S.Ct. at 2703. Adopting that characterization, the control of alcohol qualifies as the regulation of a vice. In fact, this Court has specifically categorized alcohol with cigarettes, gambling and prostitution. *Posadas de Puerto Rico*, 478 U.S. at 346. *Posadas de Puerto Rico* and *Edge* typify the approach taken by this Court when government regulates advertising of vice activities.

Posadas de Puerto Rico examined the constitutionality of a Puerto Rico statute and regulations which prevented

the advertising of casino gambling to Puerto Ricans although advertising to tourists was allowed. The appellants, operators of a hotel and casino, claimed that the statute was violative of the First Amendment's protection of commercial speech, both facially and as applied. This Court applied the *Central Hudson* test. Easily finding that the first two prongs of the test were satisfied, this Court turned to an analysis of the " 'fit' between the legislature's ends and the means chosen to accomplish those ends":

> The Puerto Rico Legislature obviously *believed*, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. *We think the legislature's belief is a reasonable one*, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

478 U.S. at 341-42 (emphasis added).

Looking to the fourth prong of the test, the *Posadas de Puerto Rico* Court had no difficulty determining that the restriction on casino advertising was no more extensive than necessary to serve the state's interest. The appellant suggested other means by which the state's interest could be effectuated without impinging on its commercial speech. This Court would have none of it, explaining that it is up to the legislature to decide that policy. 478 U.S. at 344.

Posadas de Puerto Rico continues the evolution of the *Central Hudson* test in the area of vice regulation by the states.

> It would * * * surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand * * * to legalization of the product or activity with restrictions on stimulation of its demand on the other hand * * *. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Posadas de Puerto Rico, 478 U.S. at 347-48 (citations omitted).

Edge, like *Posadas de Puerto Rico*, examined whether advertisement of gambling opportunities could be regulated by the government. This Court considered the balancing of interests between lottery and non-lottery states as "the substantial governmental interest that satisfies *Central Hudson*." 113 S.Ct. at 2704. "We made clear in *Fox* that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable. * * * This was also the approach in *Posadas* * * *." 113 S.Ct. at 2705 (citations omitted).

In *Edge* the federal statutory ban on broadcast lottery advertisements in non-lottery states was upheld in the face of a First Amendment challenge. Initially the Court observed:

> [T]he activity underlying the relevant advertising – gambling – implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

113 S.Ct. at 2703. Applying the *Central Hudson* test, the fit between the restriction and the government interest was found to be reasonable. This Court, again citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), noted that the fit need not necessarily be perfect. *Edge*, 113 S.Ct. at 2705. Although the government could have protected its interests in other ways, the regulation was found not to be more extensive than necessary. 113 S.Ct. at 2704-2705.

Bigelow v. Virginia, 421 U.S. 809 (1975), removed any doubts that commercial speech is accorded some level of protection. *Central Hudson* established the test by which regulation of commercial speech is to be measured. However, developments since *Central Hudson* have not altered the secondary status afforded commercial speech in the pantheon of First Amendments rights. Furthermore, as the most recent cases show, particularly *Edge*, even within the commercial-speech category there is a hierarchy of more and less protected areas of speech. Where vice is concerned more leeway is allowed and this Court defers to the judgment of the regulators. Just as there are two levels of First Amendment speech protection, commercial speech being subordinate to noncommercial speech, there

are two levels of commercial-speech protection – vice regulation and professional regulation are afforded different levels of First Amendment protection.

After the decisions in *Posadas de Puerto Rico* and *Edge* there can be no doubt that the *Central Hudson* test is currently considerably less exacting than originally formulated. In fact, this Court has explicitly recognized that "other formulations in our commercial speech cases support a more flexible meaning for the *Central Hudson* test." *Fox*, 492 U.S. at 477. After all, "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction,' * * * and other varieties." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Petitioners' failure to acknowledge this second line of cases considerably weakens their claim for this Court's writ.

The court of appeals observed that: "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." *44 Liquormart*, 39 F.3d at 7, A. 7. The Court of Appeals for the Ninth Circuit has recognized that: "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised." *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429, 439 (9th Cir. 1993), *citing Posadas de Puerto Rico* and *Central Hudson*. The state's interest in promoting temperance by decreasing the amount of consumption is, thus, logically advanced by the ban on alcohol-price advertising. The court of appeals commented that: "the State is entitled to a reasonable choice." *44 Liquormart*, 39

F.3d at 7, A. 6. This Court's decisions mandate that result and further guidance on the subject is unnecessary.

Petitioners assert that the state's only interest is in preventing price wars among liquor store retailers. Petition (Pet.) at 18. That is a very narrow and misleading characterization of the state's interest. The general interest is in promoting temperance. The more specific interest, as recognized by the court of appeals, is in not promoting increased purchases of alcoholic beverages. 39 F.3d at 7, A. 7. Petitioners seek to minimize the effect of the advertising ban by proclaiming again and again that: "Rhode Island was in the top 30 percent of the states in per capita consumption with the ban in place!" Pet. at 19. *See also,* Pet. at 7, 20, 21, 23. The emphasis on ranking is misplaced. For all we know, without the ban Rhode Island might rank #1.

Although the Court determined that Oklahoma's ban on advertising wine on cable television programming was preëmpted by federal law, in *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984), Justice Brennan, writing for a unanimous court, observed:

> On the other hand, application of Oklahoma's advertising ban to out-of-state signals carried by cable operators in that State is designed principally to further the State's interest in discouraging consumption of intoxicating liquor. * * * Although the District Court found that "consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages," * * * *we may nevertheless accept Oklahoma's judgment* that restrictions on liquor advertising represent at least a reasonable, albeit

> limited, means of furthering the goal of promoting temperance in the State.

467 U.S. at 714-715 (emphasis added). The court of appeals properly accepted Rhode Island's judgment. This Court has never required empirical evidence to rebut the policy determinations of state legislatures. Room is allowed for legislative judgment. *Edge*, 113 S.Ct. at 2707.

Petitioners further contend that the measures are underinclusive. Pet. at 19. The argument is that since "Rhode Island does not regulate all, or even any, advertising of alcoholic beverages other than price advertising," there is no "immediate connection" between the state's temperance interest and the price ban. In support of that contention petitioners cite to *Capital Cities Cable, City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S.Ct. 1505 (1993), and *Edenfield*.

In *Capital Cities Cable* this Court found that Oklahoma's interest in barring television advertisements of wine was of insufficient weight to counter regulations issued by the Federal Communications Commission. 467 U.S. at 700. However, the Court did not dismiss the Oklahoma advertising ban out of hand, but rather found it "reasonable." 467 U.S. at 715. There is no discussion in *Capital Cities Cable* regarding underinclusiveness *per se*. Similarly, *City of Cincinnati* does not specifically discuss the concept of underinclusiveness. The decision there was compelled because the city failed to show the requisite "fit" between its asserted interests and the means chosen to promote those interests. 113 S.Ct. at 1516. "[T]he distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted * * * ." *Id. Edenfield*, in like

manner, is of no assistance to petitioners both because a profession was the subject of the regulation and because the regulation did not fit the intended purpose.

In *Posadas de Puerto Rico*, as here, the argument was made that, because all advertising was not prohibited, the partial ban was underinclusive. 478 U.S. at 342. This Court rejected that contention, finding that the partial ban directly advanced the government's interest in reducing demand for gambling. *Posadas* appears to compel a rejection of petitioners' underinclusiveness claim.

Petitioners insist that "common sense dictates that if the state's theory is correct, there should be empirical evidence to support it." Pet. at 21. However, the court of appeals pondered a court's reaction when "there is no empirical evidence either way and expert opinions go both ways[.]" 39 F.3d at 7, A. 6. Furthermore, the district court prefaced its findings of fact with: "At the outset, I note a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 546 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994). Thus, rather than being a common sense issue, the price-advertising ban remains a question for legislative judgment.

At trial the petitioners attempted to have the New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964, introduced as a full exhibit. The state objected arguing that the report was hearsay and had not

been relied on by petitioners' experts. Petitioners contended that the report was admissible under either Federal Rules of Evidence 803(8) or 803(18). The trial judge sustained the state's objection. The report was, thus, not before the trial justice. Nevertheless, petitioners relied on the report in their brief to the court of appeals. Respondents again objected, arguing that the report was not a part of the record. Tenaciously, petitioners again rely on the Moreland Report in their petition to this court. Pet. at 21-22. In footnote 10, Pet. 22, they observe that the report "has been noticed by several courts in ruling on alcoholic beverages related issues." In those cases the report was on the record. That report is not a part of the record in this case and petitioners' reliance on it is entirely misplaced.[4]

Citing *Central Hudson*, petitioners appear to argue that Rhode Island's price-advertising ban is a "blanket ban on commercial speech." Pet. at 24, *quoting Central Hudson*, 447 U.S. at 566, n.9. Nothing could be further from the truth. The ban only extends to advertisement of the prices at which alcoholic beverages are offered for sale. All other advertising of alcoholic beverages is permitted in Rhode Island. National advertising is omnipresent. The Rhode Island legislature may well have believed that the ban on price advertising would lower the overall incidence of alcohol promotions. Generally

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[4] Petitioners at least tried to introduce the Moreland report, which is more than they did with M. J. Waterson, ADVERTISING BRANDS AND MARKETS, (Advertising Ass'n Monograph, 2nd ed. 1985) on which they rely at footnote 11, Pet. 23-24. That report is directed to any court's attention for the first time in this petition.

speaking the available beverages do not vary substantially from retailer to retailer. Thus, the only major difference between one liquor store and another may be the prices at which the alcohol is sold. Without being able to advertise lower prices, merchants may well decide not to advertise at all. To the extent that the ban reduces overall advertising by retailers who believe it is not cost effective, the state's interest in promoting temperance is furthered.

Petitioners insist that the court of appeals impermissibly shifted the burden of proof from the state to prove that its statutes directly advance the government's interest. Pet. 16. They recognize that the court specifically stated that the burden is on the state. 39 F.3d at 7, A. 5. Petitioners nevertheless argue that, because the district court's findings of fact were disregarded, the burden was shifted to them. Pet. 16. The court of appeals in effect found that the district court had exceeded its authority in finding: "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. at 549, A. 31. There was "no empirical evidence either way." 39 F.3d at 7, A. 6. Thus, "the State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." *Id.* The court of appeals cited *Fox*, 492 U.S. at 478:

> [W]e have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate

> interest," * * * . *And we have been loath to second-guess the Government's judgment to that effect.*

(Citations omitted, emphasis added.) Thus, the court was not shifting the burden but, rather, was following the dictates of this Court.

The court of appeals' opinion follows this Court's precedents in the commercial-speech arena. Petitioners' reliance on cases analyzing commercial speech in the advertising of professional services is unavailing. At issue in this case is advertising that does no more than propose a commercial transaction. Petitioners want to sell more liquor and would like to advertise low prices to do so. The state has an interest in promoting temperance and, thus, does not want to encourage more liquor sales. The price-advertising ban directly advances the state's interest. The test applied by the district court was unnecessarily rigorous as recognized by the court of appeals. Inasmuch as the decision below was correct, this petition for a writ of *certiorari* should be denied.

B. The statutes under review are no more extensive than necessary to serve the state's interest in promoting temperance.

In *Fox* this Court explored the last element of the *Central Hudson* test. Particularly, the meaning of the word "necessary" was canvassed. The Court rejected outright the least-restrictive-means standard. 492 U.S. at 477. Rather:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," * * * – a fit that is not

> necessarily perfect, but *reasonable*; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" * * * that employs not necessarily the least restrictive means but, * * * a means tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

492 U.S. at 480 (citations omitted, emphasis added).

Without citing to any specific language so holding, petitioners maintain that the court of appeals adopted a rational-basis test for determining whether the statutes are more extensive than necessary. Reference to the opinion demonstrates that petitioners are just plain wrong: the test applied by the court of appeals was that of "reasonableness." 39 F.3d at 7, A. 5. The standard applied by the district court and rejected by the court of appeals approached a least-restrictive-means test. The trial judge referred to alternatives which the legislature might have chosen. *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. at 554, A. 45. In this petition there are suggestions of alternatives which might have been chosen by the state. Pet. at 26. The problem with petitioners' argument is that *Fox* teaches differently. Petitioners depend on a footnote from *City of Cincinnati* in their attempt to establish a least-restrictive-means standard without actually denominating it so. 113 S.Ct. at 1510 n.13. However, the subsequent decision in *Edge* validated the *Fox* approach: "not necessarily perfect, but reasonable." *Edge*, 113 S.Ct. at 2705. That is the test appropriately applied by the court of

appeals: the statutes under review pass constitutional muster.[5]

Reasonably viewed the Rhode Island statutes prohibiting alcohol-price advertising, albeit limited, are constitutionally acceptable means of furthering the goal of promoting temperance in the state. *Capital Cities Cable,* 467 U.S. at 715. The court of appeals was entirely in concert with the decisions of this Court in that regard. There is no need for review of the decision below and no necessity for its correction.

III. The Twenty-first Amendment's interaction with other constitutional guarantees and statutory mandates does not dictate its relationship to commercial speech.

Citing to a number of this Court's decisions, petitioners assert that: "[t]he Court has consistently rejected states' attempts to rely upon the Twenty-first Amendment as a justification for abrogating other constitutional provisions." Pet. at 12. Each of those decisions was made on its own merits in the light of its own facts and is not dispositive of the merits in this case. The litany is protracted: *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (import-export clause); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (due process clause);

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[5] Petitioners cite to petitioner's brief to this Court in *Bentsen v. Coors Brewing Company,* No. 93-1631, and to the transcript of the oral argument heard on November 30, 1994. There would appear to be some question as to the precedential value of the case until such time as a reasoned decision has been issued.

Craig v. Boren, 429 U.S. 190 (1976) (equal protection clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (Congress' spending power); *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (antitrust laws); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (economic protectionism); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (commerce clause); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (antitrust laws); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (commerce clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (establishment clause). Pet. at 12-13. It is also unavailing.

This Court's decisions in *Posadas de Puerto Rico* and *Edge* have established that First Amendment protection of commercial speech is not sacrosanct. In *Posadas de Puerto Rico* the Court observed that: "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46. The authority of the states to totally ban traffic in alcoholic beverages under the Twenty-first Amendment is unquestioned. Following the reasoning of *Posadas de Puerto*, then, the states have the lesser power to ban alcohol advertising. Similarly, in *Edge* the court observed: "the activity underlying the relevant advertising – gambling – implicates no constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." 113 S.Ct. at 2703. Alcohol consumption is not a constitutionally protected right and, contrary to petitioners' contention, there is no "constitutional right to obtain accurate price information about [alcohol]." Pet. at 3. Thus, the First Amendment guarantee to freedom of

speech has its limits when it enters the realm of commercial speech. Decisions of this Court in other constitutional contexts do not exact a finding that restrictions on alcohol advertising are constitutionally infirm.

IV. Rhode Island's ban on alcohol-price advertising is constitutionally applicable to out-of-state retailers.

Petitioners maintain that the price-advertising ban cannot apply to Peoples as an out-of-state entity. "The Twenty-first Amendment does not empower the states to regulate economic activity beyond their borders." Pet. at 27. The point petitioners fail to grasp is that the applicable Rhode Island statute, R.I. Gen. Laws § 3-8-8.1, A. 49, applies only to activity taking place within the circumscribed borders of that state. Furthermore, in support of this argument, petitioners quote *Brown-Forman*, and cite *Healy v. The Beer Institute*, and *Bacchus*. All three of those cases are expositions of the Commerce Clause. The court of appeals specifically found that petitioners had waived the Commerce Clause. 39 F.3d at 9, A. 11-12. Particularly, petitioners' claim of economic protectionism is not before this Court, grounded firmly as that concept is in the Commerce Clause.

Even if these issues were properly raised, there is no merit to petitioners' protestations. Quoting *Bigelow v. Virginia*, 421 U.S. at 824-25 (1975), petitioners emphasize that the state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." Pet. at 28. *Bigelow*, however, does not require that Rhode Island must allow alcohol-price advertising by out-of-state retailers. Selling alcoholic beverages is legal

in Massachusetts; Rhode Island does not attempt to bar retailers from disseminating information regarding that activity. Nevertheless, *Bigelow* does not go so far as to permit Massachusetts law allowing price advertising to dictate to Rhode Island what its laws must provide. "Advertising, like all public expression may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 825-26. Rhode Island has determined that its temperance interest is served by prohibiting alcohol-price advertising. Such a prohibition is a reasonable regulation and is, thus, legitimate under *Bigelow*. Massachusetts has made a different decision regarding price advertising but its policies cannot be imposed upon a sister state pursuant to any authority derived from *Bigelow*.

Plaintiffs claim that the media alcohol-price advertising ban "concerns the sale of products outside [Rhode Island's] jurisdiction." Pet. at 27. They further imply that Rhode Island is regulating economic activity in Massachusetts. *Brown-Forman*, cited by the petitioners to support their contention, does not aid their cause. In *Brown-Forman* a New York liquor regulation was found to violate the Commerce Clause because it *controlled* prices in other states. 476 U.S. at 583. The Rhode Island measures regarding price advertising have absolutely no impact on what Massachusetts retailers may or may not do in Massachusetts. The statutes do control what a Massachusetts retailer may do in Rhode Island. However, it is entirely within the scope of Rhode Island's police power, even without resort to the Twenty-first Amendment, to regulate within its borders retailers' commercial activities whether those retailers be from Rhode Island, Massachusetts, or any other jurisdiction.

Rhode Island's ban on the advertising of liquor prices in Rhode Island media outlets is a reasonable exercise of its power to regulate alcohol under the Twenty-first Amendment. All other advertising of liquor is allowed. Thus, information regarding brand availability, assortment, and quality may be readily advertised in Rhode Island media sources by both Rhode Island merchants and those from Massachusetts. Rhode Island does not exert any control over what its citizens may buy in Massachusetts. Furthermore, of course, the Rhode Island regulations make no effort to curb Massachusetts price advertising in Massachusetts media outlets. Thus, if a Rhode Island citizen is eager to investigate liquor prices in Massachusetts, there is no dearth of readily available information to be found from Massachusetts sources. Massachusetts newspapers circulate freely throughout Rhode Island. Massachusetts radio stations are heard throughout Rhode Island. Most Rhode Islanders have over-the-air access to Massachusetts television programming. A dealer in Massachusetts may advertise his prices in Massachusetts without regard to any Rhode Island regulation. Indeed, he may advertise his wares in Rhode Island without offending any law or regulation. What he cannot do is to advertise the price of his wares in Rhode Island newspapers, through Rhode Island radio station advertisements or Rhode Island television station commercials. Rhode Island retailers are subject to the exact same strictures. The relationship between Massachusetts and Rhode Island advertisers is the same as that at issue in *Edge* between North Carolina and Virginia advertisers.

In spite of the fact that Massachusetts retailers and Rhode Island retailers are equally subject to the regulations, petitioners assert that the measures amount to

economic protectionism. *Bacchus* teaches: "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose * * * or discriminatory effect." 468 U.S. at 270. Here there is neither. Rhode Island does not discriminate against Massachusetts in its liquor-control statutes – retailers from both states are regulated in like manner. Rhode Island retailers enjoy no preferential benefit by reason of any state enactment. That being the case, there can be no economic protectionism. The claim is without merit and is undeserving of this Court's review.

CONCLUSION

For all of the foregoing reasons, respondent Rhode Island Liquor Stores Association respectfully urges that the petition for a writ of *certiorari* be denied.

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